SUPREME COURT, U. S.
FILED
JUL 12 1977
MICHAEL RODAK, JR., CLERK

No. 76-1470

In the Supreme Court of the United States

OCTOBER TERM, 1977

STANLEY M. ROSENBLUM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1470

STANLEY M. ROSENBLUM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 9, 1974, petitioner Edward Yawitz pleaded guilty to income tax evasion for 1968. Pursuant to his authority under 26 U.S.C. 6861, the Commissioner of Internal Revenue immediately thereafter issued jeopardy assessments against Yawitz, his wife Florence, and his controlled corporation, Clardel Drug Company. After a demand for payment was not met, the Internal Revenue Service filed notices of tax liens on September 16, 1974. On October 8, 1974, Yawitz paid approximately $42,000 to the law firm of Rosenblum, Goldenhersh, Silverstein & Zafft, as an advance payment of anticipated fees and litigation expenses in connection with the firm's agreement to represent Yawitz in a Tax Court proceeding with respect to the liabilities which gave rise to these jeopardy assessments. The law firm deposited the moneys in special bank accounts

and not in the firm's general account. Thereafter, the law firm notified the Internal Revenue Service of the payment. On November 8, 1974, the Service levied on the funds. In response to the levies, the law firm surrendered the money. After the Service denied a letter request by the law firm for return of the money, the partners of the law firm, Yawitz, his wife, and his corporation brought this action for wrongful levy under 26 U.S.C. 7426 in the United States District Court for the Eastern District of Missouri. The district court rejected petitioners' claims and dismissed the complaint (Pet. App. A-1 to A-3). The court of appeals affirmed (Pet. App. A-4 to A-16).

1. The decision below correctly held that petitioners could not recover the seized funds in a wrongful levy action under 26 U.S.C. 7426. That statute provides that "[i]f a levy has been made on property * * *, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States" to recover the property or its proceeds. In some cases, the owner of the property can obtain an injunction prohibiting the enforcement of the levy or the sale of the property. See 26 U.S.C. 7426(b)(1).

The terms of the statute and the legislative history demonstrate that only the law firm and not Yawitz could qualify as a proper plaintiff in a wrongful levy action under 26 U.S.C. 7426. The parenthetical phrase—"(other than the person against whom the tax is assessed out of which such levy arose)"—excludes the taxpayer Yawitz from the scope of the statute. Moreover, the pertinent committee report explicitly states that the statutory term "wrongful" refers "to a proceeding against property which is not the taxpayer's." S. Rep. No. 1708, 89th Cong., 2d Sess. 30

(1966). But while the law firm might have been a proper non-taxpayer plaintiff under the statute, the district court correctly dismissed its suit because it introduced no evidence that the fund in question belonged to it rather than to petitioner Yawitz.

As in any civil action, the plaintiff in a wrongful levy suit must demonstrate that he has a property interest in the assets seized by the Internal Revenue Service. Although the law firm asserts (Pet. 7 n. 1) that the funds were "paid to the firm pursuant to a prior contract to provide legal services for the taxpayers," it made no showing or even a bare allegation that the fund was paid pursuant to a retainer-type arrangement in which it would have been entitled to keep the money whether or not it performed the services. The fact that the law firm deposited the fund in special bank accounts rather than in its general account suggests that it did not have an unrestricted property interest in the money. Nor does the law firm assert that it has performed any services to justify its retention of the fund. Indeed, throughout this litigation, the law firm has contended only that it is entitled to a return of the fund to vindicate Yawitz's alleged constitutional right to counsel in the Tax Court (See p. 5, and n. 3 *infra*). Under these circumstances, without any proof that the law firm had any property interest in the moneys seized by the Internal Revenue Service, there is no basis upon which it could maintain an action for wrongful levy.[1]

---

[1] *Griswold* v. *Connecticut*, 381 U.S. 479, 481, upon which petitioners rely (Pet. 6-8), is distinguishable. There, the Court held that a physician convicted of giving birth control advice to married persons had standing to raise the constitutional rights of married people with whom he had a professional relationship. In the Court's view, it was the criminal conviction that provided the Article III "case or controversy" and distinguished the case from the declaratory judgment action involved in *Tileston* v. *Ullman*, 318 U.S. 44. This case, however, is not even remotely comparable. Here, the district court's jurisdiction to entertain the law firm's suit under 26 U.S.C. 7426 depends upon a showing that the firm had an ownership interest in the seized funds. In the absence of any evidence of such an interest, the court properly dismissed the action.

2. In the absence of any evidence that the law firm had a property interest in the seized fund that would support a wrongful levy action under 26 U.S.C. 7426, it was a reasonable inference that petitioner Yawitz—the source of the money—owned the fund, and that the fund, like Yawitz's other assets, is subject to the government's tax lien.[2] Since the government's tax lien attached to all of Yawitz's assets (26 U.S.C. 6321), his post-lien transfer of the fund to the law firm gave the law firm no property rights to the fund as against the government (Pet. App. A-2, A-7). But if Yawitz is the real plaintiff, then the action is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), to which the parenthetical exception in 26 U.S.C. 7426 makes reference (see p. 2, *supra*). The Anti-Injunction Act generally provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." Since the relief sought by petitioners would prevent the Internal Revenue Service from collecting taxes that have been duly assessed against Yawitz, the suit is foreclosed by the Act. See, *e.g.*, *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7-8; *Bob Jones University* v. *Simon*, 416 U.S. 725, 738-739. If petitioner Yawitz wishes to challenge the Service's assessment, his proper course of action is to bring a refund suit in the appropriate district court or in the Court of Claims.

Moreover, the limited exceptions to the Anti-Injunction Act established by the Court in *Williams Packing Co.* are

---

[2]Cf. *Flores* v. *United States*, Nos. 75-1627, 75-1698, decided April 11, 1977 (C.A. 9). There, in the absence of any proof at all as to the ownership of a seized fund, the court held that the plaintiff was entitled to prevail in a wrongful levy action. But unlike that case, where there was no evidence that the seized fund belonged to the taxpayer, here the record establishes that the source of the fund was Yawitz and that he transferred it to the law firm three weeks after the Service's notices of lien were filed (Pet. App. A-1). Hence, the fund in question either belonged to Yawitz or the law firm.

inapplicable in this case. There, the Court held that a taxpayer could lift the bar of the Anti-Injunction Act if (1) he could show irreparable injury to support equity jurisdiction, and (2) that at the time of suit it was clear that under no circumstances could the government ultimately prevail on the merits of its claim.

Here, however, petitioners have not demonstrated that collection would result in irreparable injury. The only injury that petitioner Yawitz alleged that he would suffer if the Internal Revenue Service retained the seized funds was the possibility that he would be deprived of an opportunity for a fair hearing in a later proceeding in the Tax Court because of his inability to compensate counsel. But the courts have uniformly rejected such pre-trial claims as premature and have held that a taxpayer is at best entitled to a post-trial determination whether he has been deprived of any constitutional right of representation. *Lloyd* v. *Patterson*, 242 F. 2d 742 (C.A. 5); *Illinois Redi-Mix Corp.* v. *Coyle*, 360 F. 2d 848 (C.A. 7); *Avco Delta Corporation Canada, Ltd.* v. *United States*, 484 F. 2d 692 (C.A. 7); *United States* v. *Brodson*, 241 F. 2d 107 (C.A. 7), reversing 136 F. Supp. 158 (E.D. Wis.). See *Human Engineering Institute* v. *Commissioner*, 61 T.C. 61, 66-68. The court of appeals therefore properly refused (Pet. App. A-15) to presume, in advance of any Tax Court hearing, that the Tax Court would not afford Yawitz a fair and adequate hearing and grant him whatever relief that court believed to be appropriate.[3] Moreover, as the court of appeals stated (Pet. App. A-15), "* * * assuming *arguendo* that the taxpayers have a constitutional

---

[3]Petitioners' argument rests on the assumption that they are entitled, as a matter of constitutional right, to be represented by counsel in the Tax Court. But the Sixth Amendment is expressly limited to criminal prosecutions. See, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335; *Argersinger* v. *Hamlin*, 407 U.S. 25.

right to be represented by competent counsel in connection with the Tax Court proceedings, it does not follow that they have a constitutional right to be represented by a particular law firm for a particular fee agreed upon in advance."[4]

At all events, as the court of appeals correctly noted (Pet. App. A-15), petitioners have also failed to satisfy the second requirement of *Williams Packing* because they have not shown that under no circumstances could the government ultimately prevail on the merits of its claim in the Tax Court. On the contrary, there is a strong likelihood that the government will be successful at least as to part of the amounts assessed, since Yawitz pleaded guilty to a charge of criminal tax evasion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

---

[4]*Commissioner* v. *Shapiro*, 424 U.S. 614, upon which petitioners rely (Pet. 8), is distinguishable. There, the Court held that the Internal Revenue Service has some obligation to disclose the factual basis for its assessment in order to permit the taxpayer to establish the applicability of the *Williams Packing Co.* exception to the Anti-Injunction Act.

DOJ-1977-07